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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x
UNITED STATES OF AMERICA,

3 v.

15 CR 867 (RMB)

4 REZA ZARRAB,

5 Defendant.

6 -----x

7 New York, N.Y.
8 September 25, 2017
12:22 p.m.

9 Before:

10 HON. RICHARD M. BERMAN

11 District Judge

12 APPEARANCES

13 JOON H. KIM
14 Acting United States Attorney for the
Southern District of New York

15 MICHAEL LOCKARD

SID KAMARAJU

16 DAVID DENTON

DEAN CONSTANTINE SOVOLOS

17 Assistant United States Attorneys

18 BRAFMAN & ASSOCIATES, PC

Attorney for Defendant Reza Zarrab

19 BENJAMIN BRAFMAN

20 HERRICK, FEINSTEIN LLP

Attorney for Defendant Mehmet Hakan Atilla

21 BY: VICTOR J. ROCCO

22 CATHY FLEMING

Attorney for Defendant Mehmet Hakan Atilla

23 ALSO PRESENT:

24 JENNIFER MCREYNOLDS, FBI

MICHAEL CHANG FRIEDAN, Paralegal, United States Attorneys

25 ASIYE KAY and SEYHAN SIRTALAN, Turkish Language Interpreters

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1 (In open court)

2 THE COURT: Nice to see you, Mr. Rocco.

3 MR. ROCCO: Thank you, your Honor. It's nice seeing
4 you.

5 THE COURT: So I've been looking carefully in the mail
6 for the last couple of days and I was looking for that big
7 stipulation which resolved all the issues that we were supposed
8 to talk about today but either I missed it or it wasn't sent,
9 so.

10 MR. ROCCO: Your Honor, if --

11 THE COURT: Hold on one second. I'm just going to
12 mention that we have Turkish language interpreters and ask
13 Mr. Zarrab and Mr. Atilla if they're able to understand these
14 proceedings with the help of the interpreters.

15 DEFENDANT ZARRAB: Yes, your Honor.

16 DEFENDANT ATILLA: Yes, your Honor.

17 MR. ROCCO: Your Honor, I think the problem -- this
18 is, hopefully, my first full week back to work. I think the
19 problem emanates from discussions we've been having with our
20 client that it has led to the delay. The government has been
21 punctual.

22 Given what happened to me this summer and given the
23 superseding indictment, it was our intention to come in to the
24 court and to request some additional time to prepare for trial
25 and our client has authorized us to make a request to

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1 November 27, which is roughly a 28- or 29-day extension in
2 light of those events, Judge.

3 I was out six weeks. I was virtually no help to the
4 defense in preparing this case for trial. Ms. Fleming tried to
5 take over.

6 THE COURT: She did a very good job, by the way.

7 MR. ROCCO: She did a yeoman job, and I was happy to
8 let her start this morning but I felt that I should take
9 responsibility for the fact that your Honor didn't get what he
10 expected and I apologize for that.

11 We resolved it with our client. We've informed the
12 government. The government will state what its position is but
13 we respectfully request 28 days until the 27th of November.

14 THE COURT: So maybe I'll just hear everybody out
15 today. Did you all agree on that? Or is this the first time
16 people are hearing that?

17 MR. LOCKARD: Your Honor, we did speak briefly before
18 the conference about the request that Mr. Rocco just made to
19 the Court. I think the government's position is we do think
20 that the current date provides ample opportunity for
21 preparation for trial. Obviously any issues occasioned by
22 Mr. Rocco's unavailability is something that we, the
23 government, are not in a position to speak to or take any kind
24 of a position on.

25 If the Court does grant the adjournment request, we do

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1 think that November 27 is an appropriate start date, and we
2 have some thoughts in mind about how to schedule the pretrial
3 proceedings, including the motion schedules, so that that date
4 not only is a good date to start after Thanksgiving but will
5 conclude in advance of the Christmas and New Year holidays.

6 THE COURT: Setting aside, what, four weeks?

7 MR. LOCKARD: Yes, your Honor. And that's based in
8 part, as we have gotten closer to trial, the government's
9 estimates of trial length typically sharpens. That has
10 happened in this case as well. And it is currently the
11 government's estimate that the government's case in chief,
12 including things like reasonable time for jury selection,
13 reasonable time for cross-examination and jury addresses, the
14 government's case would last less than three weeks, which would
15 then give a week for the defense cases, if there are any, jury
16 instructions, and deliberations.

17 THE COURT: Mr. Brafman.

18 MR. BRAFMAN: Your Honor, if I thought that by
19 sticking to the October 30 date I would get a severance I would
20 be a stickler for the October 30 date. But given Mr. Rocco's
21 condition for several weeks, which I'm glad to see him here
22 today as well, I would agree to a November 27 date for
23 Mr. Zarab and we would waive speedy trial between now and
24 then.

25 MR. ROCCO: As we would be authorized to do as well,

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1 your Honor.

2 THE COURT: Now, I'm sorry. Before we -- so that's
3 the trial date. What motions -- in other words, if I had a
4 trial date, let's say it's that date, so usually somewhere
5 around 30 days before that we would ask for motions in limine,
6 joint jury instructions, joint verdict sheet, motions in limine
7 being the most substantive, joint jury instructions, joint
8 verdict sheet, list of names and places for the voir dire, and
9 that would -- I'm going to get more precise looking at the
10 calendar but that would be the end of October sometime or
11 maybe -- maybe the very beginning of November. But are you
12 contemplating additional motions apart from the motions in
13 limine?

14 MR. ROCCO: Actually, Judge, if I may, we have -- we
15 don't intend to repeat our motions to dismiss, though we do
16 have a motion to dismiss, and I think it's primarily the result
17 of the way the government has reconfigured the case, their
18 elaboration of various of their theories of the regs and the
19 statutory authority. We don't intend to duplicate what we've
20 done before at all. We do have a motion to dismiss. I think
21 that the end of October is certainly -- actually I think we
22 could do it by the middle of October. I might ask the Court
23 for October 21. If that's pushing it for your Honor, we'd peel
24 it back a week. But we would do our best to get it in by the
25 second or third week of October. It's not going to be lengthy

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1 but I think it's going to be helpful to the Court and I think
2 it will help shape the case as we go forward as well.

3 THE COURT: So, it would be -- I don't think you can
4 easily just say we incorporate our motion to dismiss that's
5 already filed. It will be --

6 MR. ROCCO: A new motion.

7 THE COURT: I'll vacate that motion without prejudice
8 and it will be a new motion because there are new counts, new
9 defendants, etc. That would be easier.

10 MR. ROCCO: Yes.

11 THE COURT: How long would it take the government to
12 respond?

13 MR. LOCKARD: I think, your Honor, it would be helpful
14 for both the parties, and I think also the Court, our
15 suggestion would be if Mr. Rocco's new motion were filed
16 October 16 which would be halfway through October, the
17 government could file its opposition within a week on the
18 23rd, and then assuming one week for a reply, then the case
19 would be -- the motion would be submitted by the end of
20 October, October 30. That would be our proposal.

21 THE COURT: So let's talk for a minute. So here is
22 what I'm going to do. I'm not going to resolve the dates
23 today. I'm going to think about it for after we break up and
24 issue an order which will have all the dates, and I'll be
25 comfortable I haven't missed anything, but I will try to

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1 accommodate everybody's interests as expressed in that order.

2 Let's just talk for a moment about the immediate
3 pretrial submissions. Let's assume we're beyond the motion to
4 dismiss. So, as I say, we'll need motions in limine usually
5 whatever date we put in the order, the reply -- the response to
6 the motion in limine would be a week later, and there would not
7 be a reply. So it would be a week and a week for motions in
8 limine.

9 Then the joint jury instructions works this way. And
10 they would be due the same day, whatever date we select as the
11 motions in limine. The government would do a draft of the
12 proposed jury instructions in the case and get that draft to
13 the defense counsel at least a week or two before the date for
14 submission. If the defense agrees, for example, with the
15 draft, no problem, they just -- that's the instruction we would
16 use. Incidentally, in drafting the jury instructions I would
17 appreciate if you use the so-called boilerplate instructions
18 that I typically use. You either have or we'll give you a copy
19 of our typical instructions. If there is disagreement, we ask
20 the defense to note on the same document what the legal
21 objection is and what the proposed alternative motion is to the
22 one to which they object.

23 The same is true with the joint verdict sheet.
24 Government will take the first draft. Defense agrees, fine.
25 Defense has an objection, same procedure. Note the alternative

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1 jury instruction that you propose.

2 Also a list of names and places. This is typically
3 more for the burden for the government than the defense, but
4 the defense to have names and places that they anticipate are
5 going to come up in the trial, different from the government's
6 list, just the time to add that as well.

7 And then typically I would say after that, those
8 submissions, that the parties are directed not to make
9 additional submissions in the interim between then and the
10 trial.

11 MR. ROCCO: Your Honor, may I ask? How about
12 proceeded voir dire?

13 THE COURT: Sure. Questions. Yes. That is the time.
14 Sure. I forgot that. That is the time for proposed questions.
15 I think that covers pretty much everything.

16 MR. ROCCO: Judge, we have a couple more.

17 THE COURT: Sure.

18 MS. FLEMING: Your Honor, I had alluded to a couple of
19 very unusual things we have. We may have some -- we'll try to
20 work this out with the government. We spoke with them -- I
21 spoke with them last week. I hope I kept them appraised
22 adequately of what we were doing, and we do shoulder the
23 responsibility for your Honor not having a submission. But we
24 do have some unusual aspects to this case. But there are a
25 couple things I want to raise with the Court.

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1 The first is that we've made requests, for example,
2 for bills of particular and for some discovery. We have not
3 burdened the Court with any motions on that. If we can't work
4 it out with the government, there may well be burdensome
5 motions to the Court related to those.

6 THE COURT: I'm sure it's possible. My practice is
7 that to get the parties to work those things out. I'm not sure
8 I've ever had to -- I have an application pending, but never
9 needed a bill of particulars or even a motion but, you know.
10 And you could call us and we could give you an interim
11 conference to see if we could help you resolve that. Okay.

12 MS. FLEMING: There's a second one -- this case is
13 unusual in that all of the events took place in Turkey, at
14 least from our perspective of our client. And as I've alerted
15 the Court, we've made one trip to Turkey to do some factual
16 research. We're about to make another trip. And we would
17 anticipate that -- we would anticipate some Rule 15 depositions
18 that we will be having to schedule sometime before trial and
19 also anticipate that if things come up at trial that we have to
20 respond to in the defense case, that we are going to have to
21 have some sort of mechanism during the trial to do live
22 testimony that will have to be by video conference since it's
23 going to be difficult to have the government go there. They
24 won't go there. And people from Turkey won't come here. And
25 we're making a proposal on how the logistics of that work, but

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1 that's just an unusual thing. It has happened in other courts
2 but I want to alert the Court to that because it's unusual.

3 THE COURT: You're saying -- you're positing a
4 situation where the witnesses would not come to the United
5 States voluntarily, I guess?

6 MS. FLEMING: That's correct. And there is no
7 subpoena power, obviously, over them. But they would be
8 willing to testify via video live. And they could be in the
9 court and they could be cross-examined, etc.

10 THE COURT: It's a little awkward but why don't you
11 talk to the government and see how they would propose to --

12 MS. FLEMING: There are -- along with that -- and
13 again, the timing, because we have a short -- this is a short
14 schedule. The client is incarcerated. It makes it incredibly
15 difficult to try to do this.

16 THE COURT: I appreciate that. Let me ask you a
17 question before you go further.

18 So you all -- Mr. Rocco, you propose a 28-day delay.
19 Does that give you enough time to do all this stuff or not? I
20 mean there is no point in --

21 MR. ROCCO: Your Honor, we're not trying to stage
22 this.

23 THE COURT: I know you're not, but are you --

24 MR. ROCCO: We want to come back and ask the Court for
25 more time. As your Honor is aware, from the very inception of

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1 these proceedings Mr. Hakan has been intent on clearing his
2 name and getting this trial over with. So it has taken us --
3 negotiations, protracted negotiations with our client -- now
4 I'm not telling tales out of school -- to have Mr. Hakan agree
5 to this extension. We are going to try our damndest. I think
6 that a lot of what we can do -- if we need to come back for a
7 401, we will, but I don't think that that's going to be
8 necessary, Judge. We will do our best, our earnest best to do
9 everything that we can and get done informally. If we can have
10 witnesses, if there are witnesses, like a records custodian
11 that we can get to come to the United States, we will try to
12 avoid a Rule 15 deposition. I think the way we propose -- we
13 hope it will operate -- will be that the people we want to talk
14 to are available to us, want to interview are available to us
15 and the government, these Rule 15 depositions on an informal
16 basis, and we don't have to make a specific request for the
17 information. That's our earnest hope. And we may find
18 ourselves in the position where, if we don't have the time to
19 do it, that your Honor has our feet to the fire and you say
20 it's too late. We thought long and hard about the length of
21 this proposed -- this proposed delay and why we were making the
22 request, understanding that Mr. Atilla has been in jail now
23 five, almost six months. It's been very difficult on him. And
24 we have an obligation, consistent with our professional
25 responsibilities to prepare an adequate defense and provide him

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1 with a robust defense, to get this over with.

2 THE COURT: The only thing I want to say is when I go
3 back and finalize this schedule, if I can accommodate it, I
4 will. If I feel that it has to be a little bit later, I will
5 do that too.

6 MR. ROCCO: We will do our utmost best to get
7 everything done.

8 THE COURT: Within that timeframe.

9 MR. ROCCO: In that timeframe.

10 Your Honor, that's why we proposed it.

11 THE COURT: I got it.

12 MS. FLEMING: That leads into my next groveling, which
13 is one of my skills as a lawyer, groveling, which is that it
14 would really help us, and again with whatever strictures of
15 protective order necessary, it would help us a great deal,
16 particularly if we go to Turkey, to get whatever help that
17 would usually come right before trial earlier, such as Jencks
18 materials, or who the witnesses are so that we are not stuck in
19 a situation where we get Jencks materials one week before trial
20 or after we have Rule 15 depositions and have taken them and
21 now we get Jencks materials and we have to either recall
22 witnesses or go through hoops again to try and get factual
23 witnesses.

24 And I understand that's an extremely unusual request,
25 your Honor, but I'm really trying to streamline this. It's the

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1 kind of thing that we really need to be able to do the
2 witnesses once and the fact gathering and the preparation once.
3 And it's going to take a lot of cooperation.

4 I understand the government's concerns and I
5 understand their rights under the Jencks Act and the like. But
6 this is such an unusual situation, we're willing to live with
7 protective orders and the rest, so that we're not running up
8 against time and we're saying now we have to go back and redo
9 the witnesses.

10 I don't like the idea of even doing defense witnesses
11 before a trial. It bothers me to have to take any defense
12 witnesses out of order. It should really come after the
13 government has presented its entire case. But that's something
14 we have to live with, with some of our Rule 15 witnesses.

15 So it strikes me the other side of the fairness point
16 is the government should have to at least try to help us with
17 that as well. And if they have legitimate concerns about
18 fronting who their witnesses or the rest, we can live with
19 protective orders, which we have lived with the ones in place
20 already, as the Court knows, we have filed under seal,
21 complying with that, and we will do that to make sure that we
22 do not upset their applecart on Jencks materials.

23 MR. ROCCO: Your Honor, if I may just simply. I've
24 done this a number of times. The risk of Rule 15 depositions,
25 the witnesses that we don't call. We understand there's a

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1 countervailing advantage to the government in cooperating in
2 the process. And we're not hiding the ball here. We're
3 prepared to be upfront with the government, give as much notice
4 as we possibly can. We're going to continue to do our
5 interviews. Once we have witnesses identified, we're going to
6 notify the government and tell the government how the witnesses
7 will be made available.

8 I understand there's a travel restriction. The
9 prosecutors can't travel to Turkey. I'm not going to address
10 that. Quite frankly, they can do depositions. We have no
11 objection, obviously, to their participating by way of video
12 conference. So whatever we need to make it work.

13 THE COURT: Travel some place other than Turkey where
14 a deposition can be taken, for example?

15 MR. LOCKARD: Your Honor, it strikes me that there is
16 a lot of discussion about requests that haven't been made and
17 witnesses who haven't been identified. As the Court knows, it
18 is not actually unusual to have overseas witnesses. This court
19 and this district deal with Rule 15 deposition issues
20 relatively frequently. So there are certain standards to be
21 met to trigger that procedure. It depends on who these
22 witnesses are. We don't know who they are. And depends on why
23 they can't travel. We don't know why they can't travel. And
24 if there are reasonable accommodations that can be made on a
25 voluntary basis, we just don't know that.

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1 THE COURT: Okay. So will -- did you have anything
2 else?

3 MS. FLEMING: Your Honor, just another issue that we
4 think may take -- again, we'll work with the government. I
5 just don't want to surprise the Court down the road. We've
6 been translating a great deal of Turkish material into English,
7 the bulk of it is in Turkish, and we have some disagreements on
8 transcripts. We'll try to work it out with the government.
9 But that may become an issue. There may be a battle of the
10 experts or the like on transcripts. I'm just alerting the
11 Court.

12 MR. ROCCO: Your Honor, I actually thought that was
13 encompassed in the motions in limine, that we would -- but
14 that -- if the government doesn't know it, we're certainly
15 telling them, we have problems with the draft transcripts that
16 they gave. We know they're not final transcripts and, by the
17 way, that raises the collateral issue -- whether the government
18 is in the position to give us more definitive versions of their
19 transcripts, transcripts that they intend to offer at trial.

20 THE COURT: I think it would behoove you, defense
21 counsel, to sit with the government and try and thresh these
22 issues out. We've faced them before and successfully, in fact.

23 So let's deal with this speedy trial issue first. I'm
24 going to exclude time until the -- Mr. Rocco's proposed trial
25 commencement date of November 27 and find under 18 United

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1 States Code Section 3161 that the request for adjournment,
2 joined in by all parties, is appropriate and warrants exclusion
3 of the adjourned time from speedy trial calculations. I
4 further find that the exclusion is designed to prevent any
5 possible miscarriage of justice, to facilitate these
6 proceedings, including pretrial preparation, and to guarantee
7 effective representation of and preparation by counsel for all
8 parties; and, thus, the need for exclusion and the ends of
9 justice outweigh the interests of the public and the defendant
10 in a speedy trial pursuant to 18 United States Code Section
11 3161(h)(7)(A) and (B).

12 And let me give you one more thought. In the order
13 that I prepare there will also be a final pretrial conference.
14 There is no point in setting that right now because I'm not
15 sure exactly where the dates are all going to fall. But so,
16 heads-up, there will be a conference. It's usually a week, ten
17 days before the trial.

18 MR. BRAFMAN: Your Honor, I asked this the last time
19 and I thought it maybe was premature but can I assume as a
20 practical matter that the October trial date which previously
21 had been set is no longer in order?

22 THE COURT: You can now.

23 MR. BRAFMAN: Thank you.

24 THE COURT: You can as a result of today's conference.

25 MR. BRAFMAN: Thank you, sir.

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1 THE COURT: Notwithstanding we don't -- you can assume
2 for purposes of planning that it won't be before November 27
3 but can't be certain yet that it will be November 27.

4 MR. BRAFMAN: Thank you, Judge.

5 MR. ROCCO: Your Honor, may we approach at sidebar on
6 an issue that -- it's not going to come as a surprise to the
7 government but it relates to Mr. Atilla's health and rather
8 than airing it in open court we'd like to do it privately if
9 the Court is comfortable doing it.

10 THE COURT: Well can you discuss it with the
11 government?

12 MR. ROCCO: Sure.

13 THE COURT: Let me know if there is an application.

14 MR. ROCCO: Sure. I figured while we were here and
15 it's something -- it's actually a fresh issue and fresh in my
16 mind, I thought we'd discuss it today with the Court.

17 THE COURT: See if --

18 MR. ROCCO: Yes. Thank you, Judge.

19 THE COURT: If that won't be helpful, and then let me
20 know, I'll do whatever I can to be of help.

21 Mr. Lockard.

22 MR. LOCKARD: Yes, your Honor. I know the Court has
23 its own calendar to consult in order to make an assessment
24 about appropriate dates as we move towards a trial date, but I
25 just want to make clear that the government does think that

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1 November 27 or a date very close to that not only would be
2 appropriate to address the concerns that have been raised by
3 defense counsel but we also think that that is an appropriate
4 sort of a date in the sense that a longer adjournment we think
5 would impact important considerations like the public interest
6 in a speedy and public trial in this matter. You know, we
7 have, in discussions with defense counsel, we have tried to
8 make ourselves as available as possible to discuss these
9 issues, to iron them out as early as possible. In anticipation
10 of predicting what kind of an adjournment they might request,
11 we did go back to confirm availability of the government's
12 witnesses in that late November, early to mid-December
13 timeframe, and we just don't know what will happen to witness
14 availability going forward beyond that. So we would -- we
15 would urge a trial date be set in that frame so that we can
16 commence trial and complete trial before the end of 2017.

17 THE COURT: I understand. So the 27th is the Monday
18 following Thanksgiving, right?

19 MR. LOCKARD: It is, your Honor. And, you know, we
20 can propose additional mechanisms to help alleviate the trial
21 pressure, including things like ways to speed jury selection or
22 select a jury in advance. But we're quite confident that trial
23 could be completed within that window between Thanksgiving and
24 the end of the year.

25 THE COURT: That is, of course, an obvious

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1 consideration. If you start on the 27th, Christmas is
2 approximately a month away on the 25th. So the real issue is
3 whether this all can be concluded within that span
4 realistically.

5 I do think, incidentally, that the current trial date
6 needs to be -- does need to be adjusted, Mr. Brafman, because
7 of several concerns, including Mr. Rocco's absence and the
8 superseding indictment. So I do think there needs to be some
9 adjustment to the trial date. And I'll see what I can come up
10 with and hopefully put it out today or tomorrow.

11 MR. LOCKARD: Thank you, your Honor.

12 THE COURT: Anybody anything else?

13 MR. ROCCO: Thank you, your Honor.

14 THE COURT: Nice to see you all.

15 Let me just, it's on my mind, I'm sure you've thought
16 about it. So the prospect was raised by Ms. Fleming of
17 testimony by video, I guess live testimony by video. I've not
18 had to do that. I know it's doable.

19 MR. BRAFMAN: Your Honor, I note that defendants are
20 not in the courtroom. I would waive Mr. Zarrab's presence.

21 MR. ROCCO: As I would waive Mr. Atilla's presence.

22 THE COURT: So what I have done in more instances is
23 to have video depositions that the parties have taken, both
24 parties being present, and utilize those video depositions or
25 portions thereof in court here. Inevitably with live video

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1 there seem to be technical difficulties, etc., hard for the
2 jury to participate, frankly, in the back and forth. So I know
3 you'll bear that in mind in your conversations. Thanks a lot.

4 (Adjourned)